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IN THE

Supreme Court of the United States

October Term, 1961

No. 452

VITO F. LANZA and CHARLES F. RANK,
Petitioners,

against

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Respondents.

JURISDICTIONAL STATEMENT

VITO F. LANZA,
Attorney for Petitioners,
32 Court Street,
Brooklyn 1, New York.

SAMUEL SHAPIRO,
of Counsel

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IN THE

Supreme Court of the United States

October Term, 1961

No. .....

VITO F. LANZA and CHARLES F. RANK,
Petitioners,

against

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney-General of the State of New York,
Respondents.

JURISDICTIONAL STATEMENT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The jurisdictional statement filed on behalf of petitioners, respectfully shows:

Appeals to This Court

1. Petitioners have appealed to this court from the judgments entered in the office of the Supreme Court of the State of New York in and for the County of Kings, on October 11, 1961, January 4, 1962 and August 23, 1962 and from the order of the Court of Appeals of the State of New York

entered in the office of the Clerk of that court on May 17, 1962.

Respondents had delayed filing of the remittitur, and entry of final judgment as directed by the Court of Appeals. Petitioners, to preserve their right to appeal to this court filed their original notice of appeal before respondents filed the remittitur and the final judgment, and petitioners filed their supplemental notice of appeal after the filing of the remittitur and the entry of final judgment.

The notices of appeal were filed in the office of the Clerk of said Supreme Court. The original notice of appeal was filed on August 10, 1962. The supplemental notice of appeal was filed on August 28, 1962. Said notices of appeal are respectively Appendix I and Appendix II hereto.

2. The original notice of appeal is from the following:

(A) The final judgment of such Supreme Court entered on October 11, 1961, which dismissed the petitioners' complaint. Said judgment is Appendix III hereto.

(B) The final judgment of such Supreme Court entered on January 4, 1962, which after appeal to the Appellate Division of such court, affirmed the dismissal of the petitioners' complaint. Said judgment is Appendix IV hereto.

(C) The order of the Court of Appeals of the State of New York entered in said court on May 17, 1962, which by a divided [4 to 3] court modified both said judgments to the extent of directing judgment in favor of respondents declaring that the New York State Statute, which was the subject of the action in which said judgments and order were entered, is constitutional and adjudging that it was proper for the respondent Mayor of the City of New York to appoint new members to the Board of Education, in accordance

with the provisions of said Statute. Said order is Appendix V hereto.

3. The supplemental notice of appeal is from the final judgment of such Supreme Court entered on August 23rd 1962, which after appeal to said Court of Appeals modified both said judgments to the extent of directing judgment in favor of respondents declaring that the New York State Statute, which was the subject of the action in which said judgments and order were entered, is constitutional and adjudging that it was proper for the respondent Mayor of the City of New York to appoint new members to the Board of Education, in accordance with the provisions of said Statute. Said judgment is Appendix VI hereto.

Opinions in Courts Below

4. The opinions of Special Term of the Supreme Court were respectively handed down on September 19, 1961 and September 25, 1961. The first opinion is not reported. The second opinion is reported at 30 Misc. 2d 212, 220 N.Y.S. 2d 477. The memorandum decision of the Appellate Division was handed down on December 21, 1961 and is reported at 15 A.D. 2d 552, 222 N.Y.S. 2d 1019. The opinions of the Court of Appeals, one opinion for the majority of the court, and two opinions for the minority of the court, were handed down on May 17, 1962 and are reported at 11 N.Y. 2d 317, 183 N.E. 2d 670 and is set forth as Appendix IV pp. 22-47 in the Petition for Certiorari. Docket #334.

The first opinion of Special Term is Appendix I in the Petition for Certiorari at page 13.

The second opinion of Special Term is Appendix II in the Petition for Certiorari at page 15.

The memorandum decision of the Appellate Division is Appendix III in the Petition for Certiorari at page 21.

The prevailing opinion of the Court of Appeals is Appendix IV in the Petition for Certiorari at page 22.

One of the dissenting opinions in the Court of Appeals is Appendix IV in the Petition for Certiorari at page 38.

The other dissenting opinion in the Court of Appeals is Appendix IV in the Petition for Certiorari at page 45.

Grounds on Which Jurisdiction of This Court is Invoked

5. A concise statement of the grounds on which the jurisdiction of this court is invoked, follows.

(A) Petitioners were members of the New York City Board of Education. They were legislated out of office by a statute of the State of New York, being Chapter 971 of the Laws of 1961, effective August 21, 1961, which is Appendix V in the Petition for Certiorari at page 48. Said statute is hereafter referred to as the New York State Statute. Petitioners were so legislated out of office, although their respective terms were to continue for some time.

(B) Petitioners instituted the action in the Supreme Court of the State of New York, for a judgment to declare said Statute to be unconstitutional and void, and to restrain the respondents from proceeding under said Statute. The action was brought pursuant to the New York State Civil Practice Act, §§ 473; 876.

Judgments and Orders Sought to be Reviewed

6. The judgments and orders which are the subject of the appeals to this court, and which are sought to be reviewed, are as follows:

The judgment of said Supreme Court dated and entered on October 11, 1961, which is Appendix III.

The judgment of said Supreme Court dated and entered on January 4, 1962, which is Appendix IV.

The order of the Court of Appeals of the State of New York dated and entered on May 17, 1962, which is Appendix V.

The judgment of said Supreme Court dated and entered on August 23, 1962, which is Appendix VI.

7. There were no requests for rehearing. The notices of appeal were filed in the Supreme Court of the State of New York, respectively on August 10, 1962 and on August 28, 1962. Such notices of appeal are referred to in paragraph 1 hereof.

Statutory Provision Conferring Jurisdiction on This Court

8. The statutory provision believed to confer on this court jurisdiction of the appeal is U.S. Code, Title 28, § 1257, which insofar as here material, provides:

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court, as follows:

(1) • • •

(2) by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The case believed to sustain the jurisdiction of this court is, Wilko v. Swan, 346 U.S. 427.

State Statute Claimed to be Violative of Constitution of the United States

9. The Statute of the State of New York, which is here involved is Chapter 971 of the Laws of New York, 1961, effective on August 21, 1961, which is Appendix V, page 48 in the Petition for Certiorari.

Questions Presented by Appeals

10. The questions presented by the appeals taken to this court, may be tersely stated as follows:

(A) Whether said New York State Statute violates Article 1, §10 of the Constitution of the United States, insofar as said Article provides that no State shall pass any Bill of Attainder.

(B) Whether said New York State Statute violates Article 4, of the Constitution of the United States, insofar as said Article provides that the United States shall guarantee to every State a Republican Form of Government.

(C) Whether said New York State Statute violates Amendment XIV, §1, of the Constitution of the United States, insofar as said Amendment provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Substantial Federal Questions Raised by Appeals

11. The Federal questions which are raised by the appeal, are substantial and of major constitutional importance, arising under the provisions of the Constitution of the United States, as follows: Article 1, §10; Article 4, §4; and Amendment XIV, §1.

12. Each and all of the questions which are presented by these appeals were raised by argument and briefs, in the Supreme Court, in the Appellate Division of the Supreme Court and in the Court of Appeals of the State of New York. The opinions and decisions of these courts, clearly show that these questions were timely and properly raised.

13. Each and all of the questions which are presented by these appeals, were in the courts below determined adversely to petitioners. In the Court of Appeals, the determination was by a 4 to 3 decision.

Facts Material to Consideration of Questions Presented

14. A concise statement of the case containing the facts material to the consideration of the questions presented, follows:

(A) Petitioners were members of the New York City Board of Education. They were legislated out of office by the New York State Statute, altho their respective terms were to continue for some time. The New York City newspapers, had during the period in question, carried daily accounts of events leading to the enactment of this Statute. Request is made for submitting these excerpts from the press, with this statement, as these excerpts were before the Court of Appeal of the State of New York.

(B) Petitioner Lanza had been appointed for a seven year term beginning May 1948 and reappointed to a seven year term beginning May 1955. Petitioner Rank had been appointed for a seven year term beginning May 1950 and reappointed to a seven year term beginning May 1957.

(C) The New York State Education Law § 306 and the New York City Charter § 523, provided for removal

of a member of the Board of Education on charges of misconduct, on notice and hearing.

(D) The New York City newspapers, during the period in question, treated with the hotly contested mayoralty campaign, and "schools" became a political issue. It was urged that there was laxity, irregularity, incompetence and corruption in the administration of the school system.

It is conceded that as to both petitioners, there never was any semblance of suggestion of misconduct and that no charges were ever made against either of them.

(E) In this setting, the New York State Statute was enacted. Insofar as here material, this Statute provided that the terms of office of the members of the Board were forthwith terminated, and for appointment of new members of the Board of Education, by the Mayor, but *only* from a list of nominees to be submitted to him by a Selection Board of 11 private persons holding named positions in named private organizations.

The Board of Education was continued as theretofore, with precisely the same duties, the same terms of office, the same number of members, and the same name. The only difference was that the Mayor instead of having an unlimited choice of appointment, was now required to appoint the members from the list to be submitted to him by the Selection Board of 11 private persons.

(F) In accordance with the New York State Statute, the Selection Board submitted to the Mayor a list of 26 nominees. It is conceded that none of the Members of the Board as constituted immediately before the enactment of this Statute, was considered by the Selection Board for nomination.

(G) On September 18, 1961 the Mayor appointed 9 of the nominees of the Selection Board to make up the

Board of Education, and these appointees took their respective oaths of office.

ARGUMENT

15. The Legislature of the State of New York is required to be as responsive to the Constitution of the United States, as are ordinary citizens. *Baker* v. *Carr*, 82 U.S. 7 L. ed. 2d 663, where it is said,

> "The whole thrust of today's legal climate is to end unconstitutional discrimination. It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired. Legislators have no immunity from the Constitution. The Legislatures of our land should be made as responsive to the Constitution of the United States as are citizens who elect the legislators."

As to Bill of Attainder

16. The New York State Statute inflicted punishment on petitioners, without a hearing, and therefore the Statute is void as being in violation of Article 1, §10 of the Constitution of the United States.

A Bill of Attainder is a legislative act which inflicts punishment without a trial. *Cummings* v. *Missouri*, 4 Wall. 277, 323. A statute, irrespective of its form, which applies either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a trial, is a Bill of Attainder. It is not requisite for a Bill of Attainder to pronounce a person guilty of a crime or to impose punishment in the form of a fine or imprisonment. *United States* v. *Lovett*, 328 U.S. 303, 315.

The plain meaning of the New York State Statute is that petitioners were guilty of being lax in their duties and caus-

ing or permitting critical conditions to exist. Petitioners could have been removed, on charges of misconduct, if there were such misconduct, after notice and hearing. Yet, no charges were ever preferred against petitioners. Instead, the Statute found petitioners guilty of serious charges without trial and removed them from office on the basis of such finding of guilt, without hearing of any kind.

The Statute was clearly a Bill of Attainder, and thus violative of Article 1, §10 of the Constitution of the United States.

As to Republican Form of Government

17. The New York State Statute is a delegation of legislative power to private persons holding named positions in named private organizations, and therefore the Statute is void as being in violation of Article 4, §4 of the Constitution of the United States.

The Constitution of the United States guarantees to each State a Republican Form of Government. In essence, in a Republic, every holder of public office must derive directly or indirectly from the people. The New York State Statute, delegates the power to appoint members of the Board of Education, who are public officers, to private persons holding named positions in private organizations.

Diligent research has not revealed a case of the United States Supreme Court, which is in point.

In the Court of Appeals of the State of New York, the majority opinion concedes that there is a diversity of opinion in State courts as to the validity of Statutes, such as the New York State Statute here involved. This opinion in part states,

> "There has been some diversity of opinion in other jurisdictions as to whether the Legislature may confer on private persons or organizations the actual power of appointing public officers, as distinguished from merely authorizing them to make nominations."

It would appear that the majority opinion, as to this phase of the case is rested on the contention that the Legislature, when delegating power to appoint (1) has not surrendered any of its legislative functions; and (2) is merely providing a method where there is more probability of securing qualified persons for public office.

In Government, power is allocated as between the Executive, the Legislature and the Judiciary. The line of demarcation is often difficult to determine. Be that as it may, if it be assumed, that the legislative function of appointment of public officers, is more in the nature of an Executive function rather than a Legislative function, still the Legislature is without right to delegate that function to private organizations or private persons who do not derive from the people, for in essence in a Republic the appointment of every public officer must derive directly or indirectly from the people.

In the Court of Appeals of the State of New York, one of the minority opinions, as to this phase of the case is rested on contention that there is a probability of undermining Constitutions of a free people, by appointment to public office thru the appointment procedure provided for by the Statute. This opinion in part states,

> "I apprehend no good reason for encouraging such a practice for it is by such means that Constitutions adopted by a free people are gradually undermined and finally over thrown."

In view of the thorough discussion in the majority opinion and in the minority opinions of the Court of Appeals of the State of New York, as to this phase of the case, there would seem to be no need for further discussion. Suffice it to say, that the Statute clearly provides for appointment of public officers, by private persons, who do not directly or indirectly derive from the people, and therefor the Statute is void as being in violation of Article 4, §4 of the Constitution of the United States.

As to Due Process and Equal Protection of the Laws

18. The New York State Statute denies to petitioners due process and the equal protection of the laws and therefore the Statute is void as being in violation of Amendment XIV, §1 of the Constitution of the United States.

It is conceded that there never was the slightest semblance of any suggestion that either petitioner was concerned with any misconduct, that the Statute under which they were appointed to public office, fixed the terms of office, and provided that they could be removed from such office only for misconduct, on notice and hearing.

Yet the New York State Statute operates to remove each petitioner from his office, without claim of misconduct and without notice or hearing. Certainly, it is a denial of due process, for the Legislature to oust petitioners who were lawfully appointed to their offices by purporting to abolish the offices, and at the same time naming other persons to such offices. *Matter of Wipfler* v. *Klebes*, 284 N.Y. 248; *Long* v. *City of New York*, 81 N.Y. 425; *People ex rel. Devery* v. *Coler*, 173 N.Y. 103, 113.

It is conceded that the Selection Board did not consider either petitioner as a nominee, for submission to the Mayor. It is settled that there is a violation of the constitutional guaranty of equal protection of the laws, by an unequal and discriminatory administration of a Statute which appears to be fair and legal on its face. *Poindexter* v. *Greenhow*, 114 U.S. 270, 295, 296; *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373, 374; *Detroit United Ry.* v. *Michigan*, 242 U.S. 238, 247.

The New York State Statute clearly deprived petitioners of their right to due process and of their right to equal protection of the laws, and therefore the Statute is void as being in violation of Amendment XIV, §1 of the Constitution of the United States.

Previous Proceedings

19. Because the respondents had failed to file the remittitur with the Clerk of the Supreme Court, altho the remittitur had been sent to the Corporation Counsel of the City of New York on May 23, 1962, petitioners to preserve their rights for review by this court, on August 14, 1962 filed a petition for a Writ of Certiorari praying that a Writ of Certiorari issue out of this court, to either or both of the Supreme Court of the State of New York and the Court of Appeals of the State of New York, to review the judgments and orders referred to in this statement. Said petition is pending before this court, under Docket No. 334.

Prayer

20. Petitioners therefore pray that this court accept jurisdiction of the appeals and permit the filing of briefs on the merits and oral argument, for resolution of the questions raised by the appeals.

Respectfully submitted,

VITO F. LANZA,
Attorney for Petitioners,
32 Court Street,
Brooklyn 1, New York.

SAMUEL SHAPIRO,
of Counsel.

Certificate of Service

I certify that the respondents Robert F. Wagner as Mayor of the City of New York and Louis J. Lefkowitz, Attorney General of the State of New York, have been properly served, in accordance with Rule 33 of the United States Supreme Court, with a copy of the foregoing Jurisdictional Statement. I execute this certificate as a member of the Bar of the United States Supreme Court.

New York City, N. Y. this September 20, 1962.

VITO F. LANZA

APPENDIX I

Notice of Appeal to the Supreme Court of the United States

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF KINGS

File 13538/1961

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE of the following:

I. Notice is hereby given that Vito F. Lanza and Charles F. Rank, the appellants above named, hereby appeal to the Supreme Court of the United States from each and all of the following:

(A) The final judgment of the Supreme Court of the State of New York in and for Kings County, entered on October 11, 1961 which dismissed the complaint in this action;

(B) The final judgment of the Supreme Court of the State of New York in and for Kings County, which after appeal to the Appellate Division of said court, affirmed the dismissal of the complaint in this action; and

(C) The order of the Court of Appeals of the State of New York entered in said court on May 17, 1962, which by a divided court modified both said judgments, to the extent of directing judgment in favor of defendants declaring that Chapter 971 of the Laws of 1961 [herein called the "New York State Statute"] is constitutional and adjudging that it was proper for the defendant Mayor of the City of New York to appoint new members to the Board of Education in accordance with the provisions of said statute.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all the papers which are part of the Remittitur returned by the Clerk of the Court of Appeals of the State of New York to the Clerk of the County of Kings, State of New York.

III. The following questions are presented by this appeal.

(A) Whether said New York State Statute violates Art. 1. §10 of the Constitution of the United States, insofar as said Article provides that no State shall pass any bill of Attainder.

(B) Whether said New York State Statute violates §4 of the Constitution of the United States, insofar as said section provides that the United States shall guarantee to every State in this Union a Republican Form of Government.

(C) Whether said New York State Statute violates Amendment XIV §1, of the Constitution of the United States, insofar as said amendment provides that no State shall deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

Dated: New York City
August 9th 1962.

VITO F. LANZA,
Attorney for Plaintiffs-Appellants,
32 Court Street,
Brooklyn 1, New York.

APPENDIX II

Supplemental Notice of Appeal to the Supreme Court of the United States

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF KINGS

File 13538/1961

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that the notice of appeal to the Supreme Court of the United States, dated August 9, 1962 and filed herein on August 10th, 1962, is supplemented to read as follows:

I. Notice is hereby given that Vito F. Lanza and Charles F. Rank, the appellants above named, hereby appeal to the Supreme Court of the United States from each and all of the following:

(A) The final judgment of the Supreme Court of the State of New York in and for Kings County, entered on October 11, 1961 which dismissed the complaint in this action;

(B) The final judgment of the Supreme Court of the State of New York in and for Kings County, entered January 4th, 1962, which after appeal to the Appellate Division of said Court, affirmed the dismissal of the complaint in this action; and

(C) The order of the Court of Appeals of the State of New York entered in said court on May 17, 1962, which by a divided court modified both said judgments, to the extent of directing judgment in favor of defendants declaring that

Chapter 971 of the Laws of 1961 (herein called the "New York State Statute") is constitutional and adjudging that it was proper for the defendant Mayor of the City of New York to appoint new members to the Board of Education in accordance with the provisions of said statute, and the final order directing judgment, including the judgment of the Supreme Court of the State of New York in and for the County of Kings, both entered on August 23rd, 1962, which after appeal to said Court of Appeals adjudicated that said New York State Statute is constitutional and that it was proper for the defendant Mayor of the City of New York to appoint new members to the Board of Education in accordance with the provisions of said Statute, and this appeal also seeks to review the form and content thereof directed over the objections of the plaintiffs-appellants.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all the papers which are part of the Remittitur returned by the Clerk of the Court of Appeals of the State of New York to the Clerk of the County of Kings, State of New York.

III. The following questions are presented by this appeal:

(A) Whether said final judgments and said New York State Statute violate Art. 1 § 10 of the Constitution of the United States, insofar as said Article provides that no State shall pass any bill of Attainder.

(B) Whether said final judgments and said New York State Statute violate § 4 of the Constitution of the United States, insofar as said section provides that the United States shall guarantee to every State in this Union a Republican Form of Government.

(C) Whether said final judgments and said New York State Statute violate Amendment XIV § 1, of the Constitution of the United States, insofar as said amendment provides that no State shall deprive any person of life, liberty or property within its jurisdiction the equal protection of the law.

Dated: New York City
August 25th, 1962

VITO F. LANZA,
Attorney for Plaintiffs-Appellants.,
32 Court Street,
Brooklyn 1, New York.

APPENDIX III

Judgment of Dismissal

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF KINGS

[SAME TITLE]

The plaintiffs having moved for an order restraining the Mayor of the City of New York, from nominating and appointing new members of the Board of Education in the place and stead of plaintiffs until the trial and final determination of the action; and the defendants having cross-moved on oral argument for a dismissal of the complaint, and an order having been duly entered in the office of the Clerk of the County of Kings on the second day of October, 1961, granting the cross-motion and dismissing the complaint.

Now on motion of LEO A. LARKIN, Corporation Counsel, attorney for the defendant, Robert F. Wagner, and a motion of Louis J. Lefkowitz, Attorney General, of the State of New York, pro se, it is

ADJUDGED that the complaint be and the same hereby is dismissed.

Dated: October 11, 1961.

JOSEPH B. WHITTY
Clerk

APPENDIX IV

Judgment of Affirmance

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF KINGS

[SAME TITLE]

The plaintiffs-appellants having appealed to the Appellate Division of the Supreme Court, Second Department, from the judgment entered herein in the Office of the Clerk of the Supreme Court, County of Kings, on or about the 11th day of October, 1961, dismissing the complaint herein, and the appeal having been duly argued in the Appellate Division and that Court in an order entered in the Office of the Clerk of said Appellate Division on the 20th day of December, 1961, having ordered and adjudged that the judgment of the Supreme Court so appealed from be unanimously affirmed without costs, (and a certified copy of said Appellate Division order having been duly filed in the Office of the Clerk of the County of Kings, on or about the 27 day of December, 1961),

Now, on motion of Leo A. Larkin, Corporation Counsel, attorney for the defendant-respondent, Robert F. Wagner, as Mayor of the City of New York, and Louis J. Lefkowitz, attorney for defendant-respondent, Louis J. Lefkowitz, as Attorney General of the State of New York, it is

ADJUDGED, that the judgment so appealed from be and the same hereby is affirmed, without costs.

Dated: Jan. 4, 1962.
at 9:39 AM

JOSEPH B. WHITTY
Clerk

APPENDIX V

Order and Remittitur of Court of Appeals

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 17th day of May in the year of our Lord one thousand nine hundred and sixty-two, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding

RAYMOND J. CANNON, *Clerk.*

REMITTITUR—May 17, 1962.

[SAME TITLE]

BE IT REMEMBERED, That on the 18th day of January in the year of our Lord one thousand nine hundred and sixty-two, Vito F. Lanza & ano., the appellants in this cause, came here unto the Court of Appeals, by Vito F. Lanza, attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Robert F. Wagner, as Mayor of the City of New York, & ano., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Leo A. Larkin, & ano., attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Samuel Shapiro, of counsel for

the appellants, and by Mr. Sidney P. Nadel, of counsel for the respondent Mayor, and submitted by the respondent Attorney General, and after due deliberation had thereon, did order and adjudge that the judgement of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is modified, without costs, in accordance with the opinion herein.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considers that the said judgment be modified, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

At a Special Term Part I of the Supreme Court held in and for the County of Kings at the County Courthouse in said County, Civic Center, Brooklyn, New York on the 23rd day of August, 1962.

PRESENT:

HON. A. LAWRENCE ACQUAVELLA,

Justice.

VITO F. LANZA and CHARLES F. RANK,

Plaintiffs-Appellants,

against

ROBERT F. WAGNER as Mayor of the City of New York, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Respondents.

The defendant respondent, Robert F. Wagner, as Mayor of the City of New York, having moved for an order directing the Clerk of this Court to enter a judgment modifying the judgment of the Appellate Division of the Supreme Court, Second Department, entered herein in the Office of the Clerk of the County of Kings on or about the 4th day of January, 1962, and the motion having duly come on to be heard before me,

Now upon reading and filing the notice of motion dated the 2nd day of August, 1962, the affidavit of John L. Radlein sworn to July 31, 1962 together with the proposed judgment annexed thereto, the remittiture of the Court of Appeals, dated May 17, 1962, and the affidavit of Vito F. Lanza, sworn to August 16, 1962, and after hearing LEO A. LARKIN, Corporation Counsel attorney for said defendant

respondent (John L. Radlein, Esq. of Counsel) in support of the motion, and Vito F. Lanza Esq. attorney for plaintiffs appellants appearing and due deliberation having been had, it is

ORDERED that the said motion be and the same hereby is granted and it is further

ORDERED that the order and judgment of the Court of Appeals be and the same hereby is made the order of this Court and it is further

ORDERED that the Clerk of the County of Kings be and he hereby is directed to enter a judgment modifying the judgment entered on or about the 4th day of January, 1962 to the extent of directing judgment in favor of the defendants (1) directing that Chapter 971 of the Laws of 1961 is constitutional and (2) adjudging that it was proper for the defendant, the Mayor of the City of New York to appoint new members to the Board of Education in accordance with the provisions of the Statute, and deleting from the judgment entered October 11, 1961 the adjudication dismissing the complaint herein and it is further,

ORDERED that it appearing to the Court that the proposed judgment annexed to the moving papers herein complies with the foregoing provisions of this order, the Clerk of the County of Kings is directed to enter said judgment and it is further

ORDERED that said determination and modification are without costs.

Enter,

A.L.A.
J.S.C.

APPENDIX VI

Final Judgment Entered August 23, 1962.

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF KINGS

[SAME TITLE]

The plaintiffs-appellants having appealed to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court, Second Department, entered in the office of the Clerk of the County of Kings on or about the 4th day of January, 1962, which judgment unanimously affirmed the judgment entered in the office of the Clerk of the County of Kings on or about the 11th day of October, 1961, dismissing the complaint herein; and the appeal having been duly argued at the Court of Appeals, and that Court in an order dated the 17th day of May, 1962 having ordered and adjudged that the judgment of the Appellate Division of the Supreme Court so appealed from be modified without costs in accordance with the opinion of said Court, and having further ordered that the records and proceedings in that Court be remitted to the Supreme Court there to be proceeded upon according to law, and an order having been duly entered in the office of the Clerk of the County of Kings on the 23rd day of August, 1962, making the order and judgment of the Court of Appeals the order of the Supreme Court, and having further ordered that the Clerk of the County of Kings be directed to enter a judgment modifying the judgment appealed from the extent of directing judgment in favor of the defendants (1) directing that Chapter 971 of the Laws of 1961 is constitutional and (2) adjudging that it was proper for the defendant, the Mayor of the City

of New York, to appoint new members to the Board of Education in accordance with the provisions of the statute,

Now, on motion of Leo A. Larkin, Corporation Counsel, attorney for the defendant-respondent Robert F. Wagner, as Mayor of the City of New York, it is

ADJUDGED that the judgment entered herein in the office of the Clerk of the County of Kings on or about the 11th day of October, 1961, be and the same hereby is modified without costs by deleting the adjudication dismissing the complaint herein, and it is further

ADJUDGED AND DECLARED that Chapter 971 of the Laws of 1961 is constitutional, and it is further

ADJUDGED AND DECLARED that it was proper for Robert F. Wagner, as Mayor of the City of New York to appoint new members to the Board of Education of the City of New York in accordance with the provisions of Chapter 971 of the Laws of 1961.

Dated: New York, N. Y., August 23, 1962.

JOSEPH B. WHITTY
Clerk.

Filed

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Kings County Clerk's Office

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IN THE

Supreme Court of the United States

October Term, 1962

No. 452

VITO F. LANZA and CHARLES F. RANK,

Appellants,

against

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

MOTION TO DISMISS

LEO A. LARKIN,
Attorney for Appellee Wagner,
Municipal Building,
New York 7, N. Y.

SEYMOUR B. QUEL,
JOSEPH M. CALLAHAN, JR.,
SIDNEY P. NADEL,
of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 452.

VITO F. LANZA and CHARLES F. RANK,

Appellants,

against

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

MOTION TO DISMISS

Appellee Wagner, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss this appeal from the final order and judgment of the New York Court of Appeals which modified the dismissal of the complaint by providing judgment for the defendants declaring that (1) Chapter 971 of the New York Laws of 1961 is constitutional, and (2) adjudging that it was proper for defendant Mayor of the City of New York to appoint new members to the Board of Education in accordance with the statute, on the ground that it does not present a substantial federal question. As to one of the asserted federal questions we make the additional argument that the matter was not raised or passed upon in the New York courts.

The appellants have petitioned this Court for a writ of certiorari to review the aforesaid order and judgment of the New York Court of Appeals. The appellees have filed

a brief in opposition to such petition (October Term, 1962, Docket No. 334).

Reported below: 30 Misc. 2d 212, 220 N. Y. S. 2d 477; 15 AD 2d 552, 222 N. Y. S. 2d 1019; 11 N. Y. 2d 317, 183 N. E. 2d 670. In addition, an unreported opinion of the New York Supreme Court, Kings County, handed down one week prior to the reported opinion of that Court, is printed as Appendix I in the Petition for Certiorari herein (Docket #334).

Questions Presented

The appeal presents the following questions:

1. Are substantial constitutional questions worthy of review by this Court presented by the appellants' contention that Chapter 971 of the New York Laws of 1961, by providing for the termination of the appellants' terms of office as members of the Board of Education of the City of New York on September 20, 1961, violates (1) the due process clause of the fourteenth amendment, and (2) the provisions of the United States Constitution (Art. 1, §10) that no State shall pass any bill of attainder?

2. Do appellants have standing in this Court to assert that the statute, insofar as it provides for the method of nomination and appointment of new school board members, is violative of Art. IV, §4 of the United States Constitution which guarantees to each State a republican form of government; and if so, does such assertion present a substantial justiciable issue?

3. Does the appellants' contention that the statutory provision for the selection and appointment of new school board members denies them the equal protection of the laws present a substantial federal question?

Statement

On August 21, 1961, the Legislature of the State of New York, at an Extraordinary Session convened by the Governor for the specific purpose of dealing with conditions then existing in the public school system of the City of New York, enacted Chapter 971 of the New York Laws of 1961, which reorganized and reconstituted the school board of the City of New York. In its enactment the Legislature found and declared that "The conditions existing in the school system of the City of New York have shaken public confidence, cause the legislature grave concern and call for prompt corrective action. These conditions include—irregularities in the school construction program—serious hazards in school buildings due to inadequate maintenance and improper repairs—instances of corruption among employees—staggering administrative complexities and needless red tape. The commissioner of education has warned that this is a time of crisis for the New York City schools and has urged prompt corrective action. The educational well-being of almost one million children is directly affected." (§1).

To cope with this situation the Legislature determined that the appointment of school board members from lists of nominees submitted to the Mayor by a selection panel composed of the responsible officers of representative educational, civic, business, labor and professional organizations active or interested in the field of education would be calculated to result in the appointment of persons of outstanding experience, competence and qualification for service on the board of education (Laws of New York, 1961, ch. 971, §§3, 5). It likewise was the judgment of the Legislature that such method of selection and appointment should promptly be put into effect so that public confidence might be re-

stored and conditions in the school system alleviated as expeditiously as possible (id., §3). The prompt institution of this new method of selection was further indicated by the fact that the Legislature intended to grant emergency powers to the board of education to deal with the emergency situation (id., §§6, 7). Accordingly, the Legislature provided that a new board of education, selected in the new manner, be appointed within 30 days and that the terms of office of the persons then comprising the membership of the Board of Education simultaneously terminate.

On September 18, 1961, the appellants, whose terms as members of the Board of Education of the City of New York would, pursuant to the terms of §2 of such statute, terminate on September 20, 1961, commenced an action for a declaratory judgment (1) declaring the new statute unconstitutional and (2) enjoining the Mayor from appointing new board members in the place and stead of the petitioners, pursuant to the provisions of the statute. In their complaint, the appellants made the conclusory allegation that the statute was unconstitutional and void in purporting (1) to terminate the balance of their terms of office on September 20, 1961, and (2) to provide that new members shall be nominated and appointed by the Mayor in the manner provided by the statute. They alleged that "under the provisions of the Home Rule Amendment to the Constitution of the State of New York [N.Y. Const., Art. IX, §9] and the provisions of the City Charter of the City of New York, Plaintiffs have a legal and constitutional right to serve out the balance of their terms as members of the said Board of Education, and the Defendant, Mayor of the City of New York, is without legal or constitutional authority to appoint new members of the said Board of Education in the place and stead of the Plaintiffs."

On the following day, in an application to the New York Supreme Court, Kings County, for a temporary injunction restraining the imminent appointment of new members of the board of education by the Mayor, the appellants' primary argument against the validity of the statute was its alleged conflict with the home rule (Art. IX, §9) provisions of the New York State Constitution. Only in response to questions by the Court did they allege generally that the statute was in the nature of a bill of attainder and that it was violative of the fourteenth amendment. The New York Supreme Court, Kings County, denied the application for the temporary injunction and dismissed the complaint as being without merit. 30 Misc. 2d 212, 220 N.Y.S. 2d 477 (1961). In their appeal to the Appellate Division, the petitioners abandoned the contention that the statute was a bill of attainder. The Appellate Division unanimously affirmed the dismissal of the complaint. 15 AD 2d 552, 222 N.Y.S. 2d 1019 (1961). On appeal to the Court of Appeals of the State of New York the statute was again upheld. However, to conform to New York practice, the judgment below dismissing the complaint was modified to provide judgment for the defendants declaring that (1) Chapter 971 of the Laws of 1961 is constitutional, and (2) adjudging that it was proper for defendant Mayor of the City of New York to appoint new members to the Board of Education in accordance with the provisions of the statute. 11 NY 2d 317, 183 N.E. 2d 670 (1962).

POINT I

Chapter 971 of the New York Laws of 1961, by providing for the termination of the appellants' terms of office on September 20, 1961, did not deprive appellants of due process nor was it a bill of attainder.

(1)

The appellants' office, having been created by statute rather than by the Constitution of the State of New York, was, in the absence of specific constitutional inhibition, subject to the plenary jurisdiction of the Legislature. A legislature, acting in the public interest and addressing itself to the office rather than at the incumbent, can abolish or shorten the term of an office of its creation notwithstanding such action may curtail the incumbent's unexpired term. Public offices are created for the benefit of the public and not granted for the benefit of the incumbent, and the officeholder has no contractual, vested or property right in the office. *Phelps* v. *Board of Education of West New York*, 300 U. S. 319, 323 (1937); *Dodge* v. *Board of Education of Chicago*, 302 U. S. 74, 78-79 (1937); *Conner* v. *City of New York*, 5 N. Y. 285, 295-296 (1851); *Long* v. *Mayor, etc. of City of New York*, 81 N. Y. 425, 427-428 (1880).

That the legislation complained of was aimed at the office, not the incumbents, is indisputable. The emergency conditions in the public schools in the City of New York required prompt corrective action. It was the duty of the Legislature to take all reasonable and necessary measures to alleviate the conditions. The obvious answer to any claim by the appellants that the constitutional provision for due process protects officeholders against arbitrary and whimsical action even when their holding of public office does not involve contractual, vested or property rights (see *Wieman*

v. *Udegraff*, 344 U. S. 183, 192 [1952]) is that the action herein cannot be so characterized.

(2)

The appellants' attack on the statute as being a bill of attainder is similarly without merit. Neither the purpose nor the effect of the statute was to punish incumbent school board members. As was hereinabove pointed out, the termination of the appellants' term of office was an unavoidable result of proper legislative action affecting the positions which they held. General legislation such as the statute herein, designed solely to provide a more effective and efficient body, and aimed at the office of school board members rather than at the incumbent officeholders, has none of the characteristics of a bill of attainder (see *Garner* v. *Los Angeles Board*, 341 U. S. 716, 722 [1951]).

United States v. *Lovett*, 328 U. S. 303 (1946), cited by appellants in support of their contention that the instant statute is a bill of attainder (Jurisdictional Statement, p. 9), is on its face clearly distinguishable from the case at bar. In fact, it becomes readily discernible from a mere reading of that decision that the challenged statute has none of the attributes of a bill of attainder. In the *Lovett* case, the House of Representatives, following a so-called investigation of certain individuals, found them guilty of "subversive" activities, and thereupon provided in an appropriation bill that such persons be forever barred from federal employment. Thus, the clear purpose and effect of the legislation was solely the punishment of these individuals by disqualifying them from all future federal employment. In the case at bar, the appellants had never been charged with or found guilty of wrongdoing nor have they been barred or disqualified from holding any office or employment. They have not been barred from or held ineligible for consideration for or appointment as school board mem-

bers in accordance with the newly devised method of selection and appointment of board members. The appellants, who had no vested or other right to be members of either the old or new Board of Education may not complain simply because they were not selected or appointed to the new board.

POINT II

Appellants have no standing in this Court to challenge the statutory provisions for the nomination and appointment of school board members based on Art. IV, §4 of the United States Constitution which guarantees to each state a republican form of government. In any event, the statute does not present any substantial constitutional questions either under (1) the guaranty clause (Art. IV, §4) or (2) the "equal protection of the laws" clause of the Fourteenth Amendment to the United States Constitution.

(1)

The claim that the statutory provisions for the nomination and appointment of school board members violate the Guaranty Clause of the United States Constitution is being raised by the appellants for the first time in this Court. In none of the pleadings, briefs or arguments below was this issue raised nor did any of the New York courts discuss or pass upon this question. Such failure to raise the federal question in the state courts precludes its consideration at this time. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 655 (1897); *New York Central R.R.* v. *New York*, 186 U.S. 269, 273 (1902); Revised Rules of the United States Supreme Court, Rule 23 (1)(f). Moreover, since the terms of office of the appellants were validly terminated by Chapter 971 of the New York Laws of 1961, the appellants do not

have the specific interest or aggrievement necessary to challenge the statutory provisions relating to the nomination and appointment of new school board members. *Dorsey* v. *Stuyvesant Town Corp.*, 299 N. Y. 512, 521 (1949), cert. denied, 339 U. S. 981 (1950). Appellant Lanza, whose term of office as a member of the board of education of the City of New York would have expired in May, 1962 even if Chapter 971 of the New York Laws of 1961 had not been enacted (Complaint, par. 7), has no standing at this time to raise *any* questions and the proceeding as to him is moot.

The only questions which the appellants raised in the Court below with respect to the statutory provisions for the nomination and appointment of school board members were two purely state questions. One was whether there was a violation of the home rule provisions (Art. IX, §9) of the New York State Constitution, and the other was whether there was an unlawful delegation of legislative authority in violation of Art. III, §1 of the State Constitution that "the legislative power of this state [New York] shall be vested in the senate and assembly." The appellants may not now seek to subvert these purely state questions concerning the validity of legislation under a state constitution into a federal question regarding the republican form of government of a state. The decision by the Court of Appeals of the State of New York sustaining the legislative authority under the Constitution of the State of New York to enact the statutory provisions herein involved is final and not open to review. *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 612 (1937). Moreover, the Guaranty Clause is nonjusticiable. *Luther* v. *Borden*, 48 U. S. (7 How.) 1 (1849); *O'Neill* v. *Leamer*, 239 U. S. 244, 248 (1915); *Houck* v. *Little River Drainage District*, 239 U. S. 254, 262 (1915); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74, 79-80 (1930); *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 612 (1937).

In any event, we do not believe we need labor the point that a statutory plan whereby responsible officers of representative organizations interested or active in education are called upon to render a public service of nominating a list of exceptionally qualified persons from whom the elected Mayor of the City of New York can make appointments to the City Board of Education involves or in anywise affects or destroys the republican form of government of the State of New York.

(2)

The appellants' contention that the statute denies them the equal protection of the laws is similarly without merit. As was hereinabove pointed out, *supra*, pages 7-8, the appellants have not been barred from or held ineligible for consideration for or appointment as school board members in accordance with the newly devised method of selection and appointment of board members. Surely, the appellants cannot predicate a claim of unconstitutionality solely on the fact that they did not receive appointments.

CONCLUSION

Appellants have presented no substantial question for resolution by this Court. The appeal should be dismissed.

October 16, 1962.

Respectfully submitted,

LEO A. LARKIN
Attorney for Respondent Wagner

SEYMOUR B. QUEL,
JOSEPH M. CALLAHAN, JR.,
SIDNEY P. NADEL,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 452

VITO F. LANZA and CHARLES E. RANK,

Appellants,

against

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

MOTION TO DISMISS

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Attorney General of the
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Supreme Court of the United States

OCTOBER TERM, 1962

No. 452

VITO F. LANZA and CHARLES F. RANK,

Appellants,

against

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

MOTION TO DISMISS

Appellee Attorney General, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that this apeal be dismissed on the ground that it does not present any substantial federal question.

Statutes Involved

The statute here challenged is Chapter 971 of the New York Laws of 1961, set forth in Appendix A of this brief. Chapter 971 repealed and replaced New York Education Law § 2553 (2), set forth in Appendix B of this brief.

Appellants seek review of a judgment of the New York Court of Appeals upholding the constitutionality of Chapter 971, a statute reorganizing and reconstituting the board of education for the City of New York.

Questions Presented

Whether appellants' claim that the statutory termination of their terms of office as unsalaried members of the board of education for the City of New York violates either (A) the due process clause of the fourteenth amendment or (B) the constitutional prohibition against bills of attainder, presents a federal question of any substance?

Whether the New York State statute involved, insofar as it provides a method for appointing new members of the board of education, is open to challenge by the appellants once it has been determined that their terms of office have been validly terminated?

Whether appellants can now raise any question based on Article IV, § 4, of the United States Constitution, in view of their failure to raise any such federal question in the New York courts?

Whether, even if otherwise properly presented, appellants' claim that the statute's provision for appointment of members of the board of education violates (A) the guaranty to each state of a republican form of government, Article IV, § 4, (B) the equal protection clause of the fourteenth amendment, or (C) any other clause of the United States Constitution, raises any substantial federal question?

Whether appellant Lanza has standing to raise *any* question, in view of the fact that even if the challenged statute had not been enacted his term of office as a member of the board of education would have expired in May, 1962?

Statement of the Case

The questions presented by this appeal are identical to those raised in a previously filed petition for a writ of certiorari (No. 334, October Term, 1962), and appellants' jurisdictional statement now presents the same arguments as the petition. By this motion, appellee Attorney General seeks dismissal of the appeal on the same grounds on which denial of the petition for certiorari was sought—absence of a substantial federal question, lack of standing, and (in the case of one of the questions for which review is sought) failure to raise the federal question in the state courts.

The New York Legislature enacted Chapter 971 of the Laws of 1961 at an Extraordinary Session which was convened by the Governor on August 21, 1961, for the purpose of taking remedial action with respect to certain serious problems and conditions existing in the educational system of the City of New York.

The Legislature noted, in Section 1 of the challenged statute, that "conditions existing in the school system of the City of New York have shaken public confidence, cause the legislature grave concern and call for prompt corrective action." These conditions, the Legislature declared, include "irregularities in the school construction program —serious hazards in school buildings due to inadequate maintenance and improper repairs—instances of corruption among employees—staggering administrative complexities and needless red tape." Further, the preamble points out that "the educational well-being of almost one million children is directly affected" and that the commissioner of education "has warned that this is a time of crisis for the New York City schools and has urged prompt corrective action" (Laws of N. Y., 1961, ch. 971 § 1).

In the Legislature's judgment, the prevailing situation made it imperative that a new board of education be appointed and that corrective action be undertaken as expeditiously as possible. To this end, provision was made for the prompt appointment of a new board of education for the City of New York from a list of nominees to be submitted to the Mayor by a selection panel composed of leaders of representative educational, civic, business, labor and professional groups interested in the field of education. By this means, the Legislature established a method of selection designed to secure "persons of outstanding experience, competence and qualification for service on the board of education." The statute specified that the terms of office of the incumbents should expire, and those of the new members begin, on September 20, 1961 (*id.*, §§ 2 and 3).

In addition, the statute strengthened the powers of the board of education and provided for a system of close supervision of the educational affairs of the city school district of New York City by the regents and the commissioner of education during an "emergency period" which was to continue until July 1, 1962 (*id.*, § 7).

Chapter 971 of the Laws of 1961 repealed and replaced the former New York Education Law § 2553(2), which had provided for a board of education for New York City consisting of nine members appointed by the Mayor. Appellants are two members of the former board of education whose appointments antedated the enactment of Chapter 971 and whose terms of office otherwise would not have expired until May 1962 and sometime in 1964, respectively. They brought this action on September 19, 1961 (one day before the deadline for the Mayor's appointments to the new board) for a judgment (1) declaring the new statute unconstitutional and (2) enjoining the Mayor from making appointments to the board "in [appellants'] place and stead."

The New York Supreme Court, Kings County, finding no merit to any of the plaintiffs' contentions, denied the application for a temporary injunction and dismissed the complaint. 30 Misc. 2d 212, 220 N.Y.S. 2d 477 (1961). The Appellate Division unanimously affirmed. 15 A. D. 2d 552, 222 N.Y.S. 2d 1019 (1961). On appeal to the Court of Appeals of the State of New York the validity of the statute again was upheld. 11 N. Y. 2d 317, 183 N. E. 2d 670 (1962). The Court of Appeals modified the judgment, however, to accord with New York practice, by affirmatively granting declaratory judgment for defendants instead of merely dismissing plaintiffs' complaint. Accordingly, judgment was directed in favor of the defendants (respondents herein) (1) declaring that Chapter 971 of the Laws of 1961 is constitutional and (2) adjudging that it was proper for defendant Mayor of the City of New York to appoint new members to the board of education in accordance with the provisions of the statute.

The decision in the Court of Appeals was by a 4-3 vote. Contrary to appellants' implication that there was a division in the Court of Appeals over the questions now sought to be raised by this appeal (see Jurisdictional Statement, p. 7), the sole ground for dissent in the Court of Appeals was a state ground—Article [redacted] § 1, of the New York State Constitution. The dissenters viewed the statute's provisions for appointment of new members of the board of education as an unconstitutional relinquishment of legislative power in violation of that section. 11 N. Y. 2d at 334, 340, 183 N. E. 2d at 680, 683. There was no disagreement among the judges with respect to any of the federal questions raised in the Jurisdictional Statement.

Argument

The federal questions for which review is sought are utterly without merit. Having failed in the New York courts,

where their contentions based upon the federal Constitution were given short shrift even by the dissenting judges in the Court of Appeals, appellants now raise questions which, particularly in light of prior decisions of this Court, can only be regarded as frivolous.

Before proceeding to a discussion of the frivolity of the questions raised, it should be noted that appellant Lanza would appear to have no standing to raise *any* question at this time, since even if Chapter 971 of the New York Laws of 1961 had not been enacted, his term of office as a member of the board of education for New York City would have expired in May, 1962 (see Complaint, par. 7).

As for appellants' grievances, it would appear that they center about (1) the termination of their tenure of office and (2) the fact that they were not appointed to the reconstituted board. Neither grievance can be made into a federal question even remotely deserving of review by this Court.

I. The statutory termination of appellants' terms of office is clearly constitutional.

Appellants attack the validity of the statute's termination of their terms of office as (1) a denial of due process, in violation of the fourteenth amendment, and (2) a bill of attainder, in violation of Article I, § 10, of the Constitution of the United States.

The office held by each of the appellants was created by the New York State Legislature, and was subject to regulation solely by that Legislature. There is no constitutional inhibition, state or federal, against the mere shortening by the Legislature of the term of an existing statutory office—especially where (as here) the office-holder serves without compensation. See *Dodge* v. *Board of Education of Chicago*, 302 U. S. 74, 78-79 (1937); *Long*

v. *Mayor of City of New York*, 81 N. Y. 425, 427-428 (1887). Nor was the instant statute a product of a vindictive state of mind as appellants seem to suggest; it was designed as a means of providing prompt corrective action in connection with conditions in the school system of the City of New York which had given rise to grave concern on the part of the Legislature (See Laws of N. Y., 1961, ch. 971 § 1). In an attempt to assure expeditious correction of these conditions, the Legislature inaugurated a new method for selecting the board of education and conferred additional powers, previously lacking, on the new board (*id.*, §§ 6, 7, 8). Appellants' claim that the statute deprives them of a right to due process is frivolous.

Similarly, appellants' contention that the statute is actually a bill of attainder is without substance. There is no basis whatever for the charge that either the purpose or effect of Chapter 971 of the Laws of 1961 was to punish or impeach appellants or any other incumbent member of the former board, or to render them ineligible for consideration as potential appointees to the new board. The legitimate purposes of the statute—expeditious correction of deleterious conditions in the New York City School system and the creation of a new, more effective and efficient board of education—are plain for all to see.

This statute has none of the objectionable characteristics of a bill of attainder. An attainder inflicts *punishment* without a judicial trial. See *United States* v. *Lovett*, 328 U. S. 303, 315, 324 (1946); *Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277, 323 (1867); *Garner* v. *Los Angeles Bd. of Public Works*, 341 U. S. 716, 722 (1951); *Communist Party* v. *Subversive Control Bd.*, 367 U. S. 1, 82-88 (1961). Nowhere does this statute bar appellants from consideration for appointment to the new board of education. Nor does it disqualifiy them from holding public office, as did the legislation struck down in *United States* v. *Lovett*, *supra*, relied upon by appellants. The *Lovett* case is wholly inap-

posite to the case at bar—here these *unsalaried* officials have not been deprived of any property right. Indeed, their major argument appears to be that they were attainted because others, rather than they, were appointed to the new board of education; that contention, of course, is patently absurd.

II. The statute's provisions for appointment of new members of the board of education are clearly constitutional and, in any event, appellants have no standing to challenge them in this Court.

Appellants' pique at not being appointed to the new board of education is reflected in their attack on the statute's provisions for appointment to the new board of education as violative of (1) the "Guaranty Clause," Article IV § 4, of the United States Constitution, and (2) the equal protection clause of the fourteenth amendment.

Not only are these contentions frivolous, but appellants lack standing even to raise them. First, if appellants' terms of office were validly terminated, they hardly could be aggrieved by the use of any method of selecting the members of the new board. Second, in the case of the argument based on the Guaranty Clause, appellants are attempting to raise a federal question for the first time in this Court. Nowhere in the pleadings or briefs before any of the New York State courts does it appear that Article IV § 4, of the United States Constitution was drawn into question. In none of the opinions handed down by the New York courts is there any discussion of the Constitutional guaranty to each state of a republican form of government. This failure to raise the federal question in the state court proceeding is itself sufficient reason for the court to decline review. Cf. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 655 (1897); *New York Central R.R.* v. *New York*, 186 U. S. 269, 273 (1902); Revised Rules of the Supreme Court, Rule 15 (1)(d), Rule 16 (1)(b).

Even if the appellants' argument had been raised before the New York courts it would at most raise a non-justiciable issue and would not present a basis for invalidating state action. *Baker* v. *Carr*, 369 U. S. 186, 223-24 (1962); *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 612 (1937); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74 (1930).

And, even if justiciable, the argument would be frivolous. Appellants' proposition is, apparently, that because the statute provides for the Mayor to appoint members of the board of education from a list of nominees submitted by a panel of "private" persons, it somehow violates the clause guaranteeing a republican form of government. The far-fetched nature of this contention should be plain. It is transparently an attempt to make a federal question out of the one issue in the case—the question of the constitutionality of the method of appointment provided for by the statute—with which the Court of Appeals had some difficulty. The difficulty however, was caused solely by a provision of the New York State Constitution. This clause, Article III, § 1, provides that "the legislative power of this State shall be vested in the Senate and Assembly." The dissents in the Court of Appeals were on the single ground that the statute's provisions for appointment amounted to an impermissible relinquishment of legislative power in violation of this provision of the state constitution. 11 N. Y. 2d at 334, 340; 183 N. E. 2d at 680, 683.

No federal ground was raised in opposition to the provisions for nomination by the selection board in the court below, and it is impossible to see any ground which could reasonably have been raised. The question of the New York State Legislature's power to prescribe the method by which offices created by that Legislature shall be filled is a question for the New York courts to determine. The majority of the Court of Appeals, in an opinion amply

supported by reason and authority, found no delegation of legislative authority (11 N. Y. 2d 317, 327-334, 183 N. E. 2d 670, 676-680). In the words of that Court:

> "whether we regard the selection board as 'private' or 'public', we perceive no constitutional bar to the legislative designation of a nominating panel, made up of people representing a knowledgeable cross section of city interests, either active or vitally interested in the educational life of the city, who could reasonably be expected to present to the mayor, on an objective and non-partisan basis, the names of individuals exceptionally qualified for service on the board of education."

(11 N. Y. 2d at 333; 183 N. E. 2d at 679).

Even assuming, *arguendo*, that the statute's provisions for appointment are somehow reviewable by this Court, their constitutionality is clear. Traditionally, appointments are within the domain of executive action; this remains the case where, as here, a public officer, the Mayor of the City of New York, makes the actual choice from among the nominees offered by the panel. *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 399 (1940). In view of the fact that the Legislature here has not delegated governmental powers to a previously existing non-governmental group, but rather has designated a number of individuals, previously unrelated to each other, to make up a new governmental body with specific responsibilities in the field of education, it seems incongruous to characterize the panel or its members as "private". They appear no less "public" in the performance of their special statutory function of providing nominees than any other officers of government. Moreover, even if the panel could conceivably be classed as "private" this would in no way affect the validity of their action. See *Cusack* v. *City of Chicago*, 242 U. S. 526 (1917); *St. Louis Iron Ry.* v. *Taylor*, 210 U. S. 281 (1908).

To be sure, statutory delegation might in some extreme cases threaten basic concepts of fairness. For example, statutes which give certain occupational groups the right to exclude others from the same occupation may impair due process. Even this principle, however, is subject to sharp qualification in the case of professional groups, *e.g.*, the activities of character committees in approving applicants for admission to the Bar, and examination and licensing by boards of experts in other professions. See *e.g.*, New York Education Law §§ 6607, 6703, 6802. But, certainly, where an agency has no licensing or regulatory functions whatever, and merely recommends nominees from among whom a public official will make the ultimate appointments, due process is not violated. Since there exists no danger of unwarranted restrictions on outsiders or abuse of power resulting from lack of political responsibility, no reason remains for suspecting a constitutional defect in the statutory selection procedure. See *Cusack Co.* v. *City of Chicago*, 242 U. S. 526 (1917), *supra*; DAVIS, ADMINISTRATIVE LAW, 71-72, 87 (1951 Ed.).

Appellants' contention that the *administration* of the statute somehow deprives them of the equal protection of the laws is without any substance whatever. How the allegation—unsupported by the record—that appellants were not considered by the selection panel for appointment to the new board of education can be made the basis of a claim of unconstitutionality is simply beyond comprehension. It is clear from the statute that appellants were and are not barred from consideration by the selection panel. As possible nominees for appointment to the new board, they stand on no different footing from anybody else.

CONCLUSION

For the reasons stated, this appeal should be dismissed.

Dated: New York, New York, October 18, 1962.

Respectfully submitted,

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APPENDIX A

Laws of New York, 1961, Chapter 971

AN ACT to amend the education law, in relation to reconstituting the board of education for the city school district of the city of New York, providing for the emergency supervision of such district, and making appropriations in relation thereto

Became a law August 21, 1961, with the approval of the Governor. Passed, on message of necessity, pursuant to article III, section 14 of the Constitution, by a majority vote, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings. The conditions existing in the school system of the city of New York have shaken public confidence, cause the legislature grave concern and call for prompt corrective action. These conditions include

—irregularities in the school construction program

—serious hazards in school buildings due to inadequate maintenance and improper repairs

—instances of corruption among employees

—staggering administrative complexities and needless red tape.

The commissioner of education has warned that this is a time of crisis for the New York city schools and has urged prompt corrective action. The educational well-being of almost one million children is directly affected.

§ 2. Notwithstanding any other provision of law, on the effective date of this section, the terms of office of the persons then comprising the membership of the board of education of the city school district of the city of New York shall terminate.

§ 3. Notwithstanding the provisions of subdivision two of section twenty-five hundred fifty-three of the education law, as added by section five of this act, the members of the board of education of the city school district of the city of New York shall be appointed to fill the vacancies occurring on the effective date of section two of this act in the manner prescribed by this section.

Within five days after the effective date of this act, the board of regents shall request the following persons to convene with the chancellor of the board of regents as a selection board for the purpose of submitting the names of nominees to the mayor of the city of New York to fill such vacancies:

the president of Columbia University;

the chancellor of the City University of New York;

the president of New York University;

the president of the Association of the Bar of the City of New York;

the president of the New York City Central Trades and Labor Council;

the president of Commerce and Industry Association of New York, Inc.;

the president of the Public Education Association;

the president of the United Parents Associations of New York City, Inc.;

the president of the League of Women Voters of the City of New York;

the president of Citizens Union; and

the president of the Citizens Budget Commission, Inc.

To constitute a quorum, it shall be necessary for at least seven of the persons specified to attend. The chancellor

of the board of regents shall be the chairman of such selection board, but he shall not participate in the final selection of the nominees. In the event that the chancellor of the board of regents shall be unable to act, the vice-chancellor of the board of regents shall act in his place.

The selection board shall receive and take into consideration in making its nominations recommendations from representative associations, civic, educational, business, labor and professional groups active or interested in the field of education.

At least five days before the effective date of section two of this act, the selection board shall submit a list to the mayor of at least eighteen names of nominees, who, in the judgment of the selection board, are persons of outstanding experience, competence and qualification for service on the board of education. On the effective date of section two of this act, the mayor shall appoint nine persons from among the nominees to be the members of the board of education of the city school district of the city of New York. If the mayor shall fail to make such appointments on the effective date of section two of this act, the state commissioner of education may make such appointments in his place from among the nominees submitted to the mayor.

If the selection board shall submit less than eighteen names of nominees to the mayor five days before the effective date of section two of this act, the mayor shall be required to fill from the names submitted that number of vacancies equal to one-half the number of names submitted disregarding resulting fractions and the mayor may fill any remaining vacancies on the effective date of section two of this act without regard to the provisions of this section.

Notwithstanding any other provision of law the terms of office of the members of the board of education ap-

pointed on the effective date of section two of this act shall be as follows: the terms of office of two members shall expire on the first Tuesday in May, nineteen hundred sixty-two, the terms of office of two members shall expire on the first Tuesday in May, nineteen hundred sixty-three, and the terms of office of the remaining members of the board appointed on the effective date of section two of this act shall expire on the first Tuesday of May in nineteen hundred sixty-four, nineteen hundred sixty-five, nineteen hundred sixty-six, nineteen hundred sixty-seven and nineteen hundred sixty-eight, respectively. Each of their successors shall be appointed in the manner specified by the provisions of subdivision two of section twenty-five hundred fifty-three of the education law as added by section five of this act and shall hold office for a term of seven years expiring on the first Tuesday in May, except that in the event of a vacancy occurring other than by expiration of term, the successor shall hold office for the unexpired term.

§ 4. Subdivision one of section twenty-five hundred fifty-three of the education law, as last renumbered and amended by chapter seven hundred sixty-two of the laws of nineteen hundred fifty, is hereby amended to read as follows:

1. No person shall be eligible to the office of member of a board of education who is not a citizen of the United States and who, *in the case of the city school districts of the cities of Buffalo, Rochester, Syracuse, Yonkers and Albany,* has not been a resident of the city school district for which he is chosen for a period of at least three years immediately preceding the date of his election or appointment *and who, in the case of the city school district of the city of New York, is not a resident thereof on the date of his appointment.*

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

§ 5. Subdivision two of section twenty-five hundred fifty-three of such law, as last amended by chapter two hundred eighty-nine of the laws of nineteen hundred sixty-one, is hereby **repealed*** and a new subdivision two is inserted in lieu thereof, to read as follows:

2. The members of the board of education of the city school district of the city of New York shall be appointed in the manner prescribed by this subdivision.

At least twenty-five days prior to the expiration of the term of office of any member, or within ten days after the occurrence of a vacancy otherwise than by expiration of term, the mayor of the city of New York shall request the following persons to convene as a selection board for the purpose of submitting the names of nominees to him for appointment to the board of education:

the president of Columbia University;

the chancellor of the City University of New York;

the president of New York University;

the president of the Association of the Bar of the City of New York;

the president of the New York City Central Trades and Labor Council;

the president of Commerce and Industry Association of New York, Inc.;

the president of the Public Education Association;

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* NOTE—Subdivision 2 of Section 2553 of the Education Law, repealed by this act, provides for the appointment of members of the board of education of the city school district of the city of New York by the mayor of said city. Such provisions will be superseded on the effective date of this act by new subdivision 2 of Section 2553.

the president of the United Parents Associations of New York City, Inc.;

the president of the League of Women Voters of the City of New York;

the president of Citizens Union; and

the president of the Citizens Budget Commission, Inc.

To constitute a quorum, it shall be necessary for at least seven of the persons specified to attend. The president of the Association of the Bar of the City of New York shall be the chairman of the selection board and shall, forthwith upon receiving the request of the mayor, give notice to the others specified of the time and place of convening. In the event that the president of the Association of the Bar of the City of New York shall be unable to act, the mayor shall designate one of the other persons specified to convene the selection board and to be its chairman.

The selection board shall receive and take into consideration in making its nominations recommendations from representative associations, civic, educational, business, labor and professional groups active or interested in the field of education.

Within fifteen days after the mayor shall have requested a convening of the selection board, it shall nominate to the mayor for each vacancy three to five persons who, in the judgment of the selection board, are persons of outstanding experience, competence and qualification for service on the board of education. Within ten days after receiving such nominations, the mayor shall appoint from among the nominees, one person to fill each vacancy.

In the event the selection board shall fail to submit its nominations to the mayor within fifteen days after the mayor shall have requested its convening, the mayor may fill a vacancy without regard to the provisions of this subdivision.

§6. Subdivisions two and three of section twenty-five hundred sixty-four of such law, such section having been so renumbered by chapter seven hundred sixty-two of the laws of nineteen hundred fifty, and subdivision five of such section, as last amended by chapter six hundred thirty-nine of the laws of nineteen hundred sixty-one, are hereby amended to read, respectively as follows:

2. There shall be in each of such districts a local school board of five members appointed by the [president of the borough in which such district is located] *board of education in such city. The board of education shall give at least thirty days notice of its intention to make such appointment or to fill such vacancy as may occur which shall be published in the same manner as notice of public hearings provided that such notice need not contain the name of any prospective appointee. The board of education shall take into consideration in making such appointment the recommendations made to it by community and neighborhood groups active in the local school board district and by representative associations, civic, educational, business, labor and professional groups active or interested in the field of education.* The board of education shall designate as a member of a local school board one member of the board of education and the city superintendent of schools shall assign one assistant superintendent to advise with such board.

3. The term of office of a member of such board shall be five years. A vacancy on such board shall be filled by the [borough president] *board of education* for the unexpired term.

5. A member of a local school board who publicly declares that he will not accept or serve in the office of mem-

ber of such board, or refuses or neglects to attend three successive meetings of such board, of which he is duly notified, without rendering a good and valid excuse therefor in writing to the chairman or secretary of such board, vacates his office by refusal to serve. It shall be the duty of the remaining members of the local school board to determine by a majority vote whether the excuse is a good and valid one. If they find that the excuse is not a good and valid one, they shall declare said office vacant and shall forthwith notify the board of education [and the borough president] of such vacancy. Thereafter such vacancy shall be filled by the [borough president. If the borough president neglects at any time to fill any vacancy on the school board within ninety days after he has been notified of such vacancy, then the mayor shall be empowered to fill such vacancy] *board of education.*

§ 7. Such law is hereby amended by adding thereto a new section, to be section twenty-five hundred fifty-four-a, to read as follows:

§ 2554-a. Special provisions relating to the city school district of the city of New York during emergency period. 1. As used in this section, the term "emergency period" shall mean the period from the effective date of this section to the first day of July, nineteen hundred sixty-two.

2. In order to place the educational affairs of the city school district of the city of New York under the closer supervision of the regents and the commissioner during the emergency period, the board of education of such district shall submit to the regents and the commissioner and to the mayor of the city of New York on the first day of January and April, nineteen hundred sixty-two, an interim progress report in such form and detail as the commissioner shall prescribe and on the first day of July, nine-

teen hundred sixty-two, a final report in such form and detail as the commissioner shall prescribe as to:

a. the corrective action taken in the emergency period and planned by the board of education with respect to the administration of the program for new school building construction;

b. the corrective action taken in the emergency period and planned by the board of education with respect to the repair and maintenance of existing school buildings and other structures under the control of the school district;

c. the disciplinary action taken in the emergency period with respect to employees guilty of accepting gratuities in relation to the performance of their duties, and the corrective action taken by the board of education to prevent recurrences of such misconduct;

d. the corrective action taken in the emergency period and planned by the board of education with respect to administrative reform and the development of a program for the division of responsibility between the board and the superintendent of schools and the administrative staff for the more efficient and effective management of the district;

e. the plans developed and action taken in the emergency period by the board of education for the revitalization of local school boards and for increased participation of residents throughout the city of New York in the affairs of their local neighborhood schools;

f. the plans developed and action taken in the emergency period by the board of education to establish a long-range program and the necessary staff organization for better informed and coordinated planning of new school construction and the modernization of existing structures; and

g. the steps taken in the emergency period by the board of education to evaluate and to improve the quality of instruction in the schools.

3. During the emergency period, the board of education of the city school district of the city of New York shall have, specifically, the power:

a. To undertake any studies, inquiries, surveys or analyses it may deem relevant through the personnel of the district or in cooperation with or by agreement with any other public or private agency;

b. To employ and at pleasure remove educational, engineering, architectural, legal or management consultants and such other assistants as it may deem necessary for the performance of its functions and fix their compensation within the amounts made available by appropriation therefor;

c. Notwithstanding the provisions of subdivision one of section twenty-five hundred sixty-five of this chapter, to remove at its pleasure by a vote of a majority of all its members, the superintendent, any deputy superintendent or any associate superintendent of schools of the district irrespective of the date of their appointments, provided, however, that the board may enter into a contract with the superintendent of schools for a period of not less than three and not more than five years; and

d. To authorize the superintendent of schools and the administrative staff of the district by by-law, rule, regulation or resolution to exercise on its behalf such of its administrative and ministerial powers and duties with respect to the administration of the city school district, the purchase, repair, remodeling, improvement or enlargement of school buildings or other buildings or sites and the construction of new buildings as the board deems necessary

or desirable for the more efficient administration of the district or for the more expeditious completion of school construction, maintenance or repairs, provided, however, that the board shall not authorize the superintendent of schools and the administrative staff to exercise any powers and duties relating to its investigative or judicial functions.

§ 8. Not later than the first day of February, nineteen hundred sixty-two, the state board of regents and the state commissioner of education shall submit to the governor and the legislature specific recommendations for such permanent changes in the laws of the state as they may deem advisable for the organization and more effective administration of the city school district of the city of New York, including, but not limited to, recommendations as to:

a. The powers necessary to ensure the board of education complete freedom to operate for the best interests of the schools unhampered by restrictive influence and controls.

b. The revitalization of the present system of local school boards in such city school district.

c. The effective participation by the people throughout the city of New York in the government of their local schools.

d. The delineation of functions and responsibilities between members of the board of education and the superintendent of schools and the administrative staff of such city school district.

e. The interrelationship of such city school district and its board of education with official agencies of the city of New York.

f. The construction, maintenance, operation and repair of school buildings and other buildings under the control of such city school district.

§ 9. The sum of one hundred fifty thousand dollars ($150,000), or so much thereof as may be necessary, is hereby appropriated from any moneys in the state treasury in the general fund to the credit of the local assistance fund, not otherwise appropriated, and shall be available for the state fiscal year ending March thirty-first, nineteen hundred sixty-two, to the state education department for the use of the board of education of the city school district of the city of New York for its expenses, including personal service, in carrying out the reporting provisions of this act, in employing consultants or in undertaking studies, inquiries, surveys or analyses in relation thereto. Such moneys shall be payable on the audit and warrant of the comptroller on vouchers certified or approved by the chairman or president of such board of education and by the state commissioner of education.

§ 10. The sum of twenty-five thousand dollars ($25,000), or so much thereof as may be necessary, is hereby appropriated from any moneys in the state treasury in the general fund to the credit of the local assistance fund, not otherwise appropriated, and shall be available for the state fiscal year ending March thirty-first, nineteen hundred sixty-two, to the state education department for the purpose of enabling the state board of regents and the state commissioner of education to carry out the provision of section eight of this act. Such moneys shall be payable on the audit and warrant of the comptroller on vouchers certified or approved as provided by law.

§ 11. This act shall take effect immediately, except that sections two, six and seven shall take effect the thirtieth day following the date of enactment of this act.

APPENDIX B

Former New York Education Law § 2553(2). (Prior to repeal by Laws of N. Y., 1961, Ch. 971).

§ 2553. Board of education; eligibility; how chosen; term of office; vacancies

* * * *

2. In the city school district of the city of New York there shall be a board of education consisting of nine members, who shall be appointed by the mayor. Two members of such board shall be residents of the borough of Manhattan, two shall be residents of the borough of Brooklyn, two shall be residents of the borough of the Bronx, two shall be residents of the borough of Queens, and one shall be a resident of the borough of Richmond. The term "resident" as used in this subdivision shall mean a person who has resided and been a qualified voter in said borough for at least three years immediately preceding the time of his appointment. The term of office of each member of such board shall be seven years and shall expire on the first Tuesday in May. As vacancies occur on such board they shall be filled from the several boroughs so that each borough shall always be represented on such board as required under this subdivision. A vacancy occurring otherwise than by expiration of term shall be filled for the unexpired term.

* * *

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 452

VITO F. LANZA and CHARLES F. RANK,

Appellants,

against

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

MEMORANDUM ON BEHALF OF APPELLANTS IN OPPOSITION TO MOTIONS TO DISMISS BY BOTH APPELLEES.

The grounds on which both appellees rest their respective motions to dismiss the appeal, are in practical effect identical, and entirely lacking in any semblance of merit.

The Statement for Jurisdiction filed by appellants, anticipated, on the basis of the positions taken by the appellees in the New York State Courts—that their respective motions to dismiss would be made on the grounds on which they are rested. The Statement for Jurisdiction is a complete answer to both motions.

It is deemed appropriate to refer to the then current public events, of which judicial notice may be taken. The New York City daily newspapers, for months before the enactment of the New York State Statute, and for months before Election Day—the entire matter was a "hot" political issue in the Mayoralty campaign—carried front page headlined items, in which the Mayor or other public officials

charged the Board with inefficiency, laxity and other misconduct, and that the Mayor had demanded the resignations of the entire Board. The Board consisted of nine members, six of whom resigned and three of whom refused to resign.

Both the Mayor and the Commissioner of Education could have brought on proceedings for the removal of the members of the Board, but this required statutory notice and a hearing. There never were any formal charges; nor were there any proceedings for removal instituted.

As to whether Federal questions raised are moot

The term of appellant Rank was not set to expire until 1964. The mere circumstance that the term of appellant Lanza was set to expire in 1962 does not render the Federal questions raised moot.

All Federal questions were raised in Court below

The Federal questions raised are these:

(A) Whether the New York State Statute violates Article 1, § 10 of the Constitution of the United States, insofar as said Article provides that no State shall pass any Bill of Attainder.

(B) Whether said New York State Statute violates Article 4 of the Constitution of the United States, insofar as said Article provides that the United States shall guarantee to every State a Republican Form of Government.

(C) Whether said New York State Statute violates Amendment XIV, § 1, of the Constitution of the United States, insofar as said Amendment provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Appellees concede that questions (A) and (C) were properly raised in the Courts below. Appellees erroneously contend that question (B) was not raised in the Courts below.

The simple fact is that all three opinions in the Court of Appeals treat with question (B)—that is whether the legislation constituted a valid or invalid delegation of power to "private" persons, in "private" associations.

The question as to whether the legislation was valid or invalid, because of the delegation of power to appoint to public office, is a broad question. Whether the power to appoint to public office is in the nature of an executive function, as claimed by appellees, rather than in the nature of a legislative function is beside the point.

In a Republic the power which the people have vested in either the executive, the judiciary, or the legislature, may not be delegated to "private" persons, who happen to be officers of "private" organizations.

This is the broad Federal question presented, and obviously the Court of Appeals of the State of New York—in which there were extended opinions, on both sides of the question, treated with the broad question of whether in a Republic, the power to appoint to public office may be delegated, rather than the narrow question as to whether that may be done under a specific provision of the New York State Constitution.

In the Court of Appeals, the majority opinion cites 22 cases all from other jurisdictions, as to this phase of the case, in support of the conclusion reached that the legislation was valid. Obviously these 22 cases from jurisdictions other than New York State, could have considerable bearing on the question as to whether in a Republic, there may be delegation of power to appoint to public office, to "private" persons, but very little bearing on the narrow question as to whether the legislation was

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The motions to dismiss

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SAMUEL SHAPIRO,
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questions (A), (B) and (C) in

CLUSION

the appeal should be denied.

lly submitted,

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